No. 89-346

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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ALASKA AIRLINES, INC. and USAIR, INC.,
*Petitioners,*

v.

DEPARTMENT OF REVENUE, STATE OF OREGON,
*Respondent.*

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**On Petition for a Writ of Certiorari to the Oregon Supreme Court**

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## REPLY BRIEF FOR PETITIONERS

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ROBERT L. WEISS
RICHARD M. BOTTERI
JAMES P. DRAUDT
WEISS, DESCAMP & BOTTERI
2300 U.S. Bancorp Tower
Portland, Oregon 97204
(503) 243-2300

WALTER A. SMITH, JR.*
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728
*Counsel for Petitioners*

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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1. Oregon does not deny that this Court's decisions preclude it from directly imposing an aircraft overflight tax. Instead, the State argues that it has not really imposed such a tax, but has simply counted overflight as an element of its aircraft property tax. Moreover, the State argues, this Court's overflight decisions are *nexus* cases, not *apportionment* cases, and that merely because the State lacks nexus to tax an activity does not mean that activity may not be fairly attributed to the State through an apportionment formula. These arguments are not only wrong; they are directly contrary to fundamental Commerce Clause and Due Process principles established by this Court. Indeed, if the decision below stands for the propositions now advanced by the State, certiorari would be appropriate for that reason alone.

a. There is no question that the tax in this case is premised on only two activities—time spent in Oregon by petitioners' flights that take off or land in the State, and time spent by their flights that only pass over the State. There is also no question that the overflight activity accounts for approximately half of the resulting tax. And there finally is no question that each and every overflight is specifically included in the taxing formula and that each additional overflight directly increases Oregon's tax by a measurable amount. Nevertheless, the State contends that overflight is *not* being taxed in this case; rather, the State says, "it taxes units of property owned and used by interstate enterprises—as wholes—and bases the proportion of each whole to which it applies its tax on the percentage of that whole located in Oregon." State Opposition ("Opp.") at 4.

In other words, the State believes that by levying a property tax on all of petitioners' planes as a *unit*, and then measuring the portion of that unit attributable to the State on the basis of overflight, it can avoid the resulting assessment being characterized as a tax on overflight. This Court's decisions do not permit such an exalting of form over substance. Instead, the Court looks to the "underlying economic realities" of an interstate company being taxed as a unitary business, *Exxon Corp.* v. *Dep't of Revenue of Wisconsin*, 447 U.S. 207, 223 (1980), and focuses on "the practical effect of [the] challenged tax." *Goldberg* v. *Sweet*, 109 S.Ct. 582, 588 n.11 (1989); *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615 (1981); *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 443 (1980). Furthermore, the label the State puts on the tax "is of no moment in determining the constitutional significance of the exaction." *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 443 (1940). Rather, as the Court has long made clear, "in passing on [the tax's] constitutionality, we are concerned *only with its practical operation* . . . ." *Id.* at 444 (quoting *Lawrence* v. *State*

*Tax Commission*, 286 U.S. 276, 280 (1932) (emphasis supplied)). Here, in practical and economic effect Oregon has imposed a substantial overflight tax on petitioners. The constitutionality of the tax must be judged on the basis of that effect.

b. The State acknowledges, as it must, that *Goldberg* v. *Sweet*, 109 S. Ct. at 589, *United Airlines, Inc.* v. *Mahin*, 410 U.S. 623, 631 (1973), and *Northwest Airlines* v. *Minnesota*, 322 U.S. 292, 302-04 (1944) (Jackson, J., concurring), declared that aircraft overflights do not provide a constitutionally sufficient basis for State taxes. Opp. 6. Yet, the State argues, "[n]one of those cases . . . purported to consider an apportionment issue" and they therefore do not preclude inclusion of overflight in an apportionment formula. *Id.* This argument not only misreads the cited cases, but seriously misconstrues the nexus and fair apportionment requirements of the Commerce and Due Process Clauses.

*Goldberg* addressed the question whether a State could apportion to itself (and tax) the whole of interstate phone calls that are paid for in that State and originate or terminate there. The Court said it could, reasoning that no intervening State had sufficient contact to tax the call, just as no fly-over States have sufficient connection to tax aircraft overflight. 109 S.Ct. at 589. Similarly, in *Mahin*, the Court held that a State could apportion to itself (and tax) the whole of fuel to be consumed in interstate flight, because none of the fly-over States could tax the consumption. 410 U.S. at 631. Yet under the State's view in this case, both *Goldberg* and *Mahin* may be easily avoided by States wishing nevertheless to tax "overflying" phone calls or airliners: the States need only include those activities in apportionment formulas and on that basis tax entities over which the State otherwise has nexus. Such a result wholly subverts the Court's decisions: *Goldberg* and *Mahin* both approved the *unapportioned* taxation of an interstate event on the express holding that *no other State*

could tax that same event. Oregon is wrong to contend that it is not bound by these holdings and that it is authorized to tax events that are already fully taxable by other States.[1]

c. Oregon is furthermore wrong to contend that its overflight tax could otherwise meet this Court's fair apportionment requirements. Those requirements, again, are practical ones, as shown by cases the State itself cites: "[a]ny formula used must bear a rational relationship, both on its face and its application, to property values connected with the taxing State." *Norfolk & Western Ry.* v. *Missouri State Tax Commission*, 390 U.S. 317, 325 (1968) (citing *Fargo* v. *Hart*, 193 U.S. 490, 499-500 (1904)). Under both the Due Process and Commerce Clauses, the apportionment must "in practical operation [have] relation to opportunities, benefits, or protection conferred or afforded by the taxing State." *Ott* v. *Mississippi Valley Barge Line*, 336 U.S. 169, 174 (1949). *Accord*, *Braniff Airways, Inc.* v. *Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 600 (1954). In short, as the Court held in *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U.S. 653, 661 (1948), "the real question [is] whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce to which the State bears special relation."

In light of these standards, we showed in our petition that the State's overflight tax has *no* connection to property values in the State, that in practice it has *no* relation to opportunities, benefits, or protections provided by the State, and that, indeed, the substantial tax the State exacts is not based on *any* specific relation with the over-

[1] Moreover, although Oregon claims that it is only taxing airline property that already "has a situs in Oregon," Opp. 14, its apportionment formula does *not* so provide. That formula taxes *all* of petitioners' overflying aircraft, whether or not the aircraft otherwise take off or land in Oregon.

flight at all. Petition ("Pet.") at 9-12.[2] The State says, however, that the fact that it offers no benefits or services to the overflight and has no special relationship to it is irrelevant. Opp. 9-10. It is enough, the State observes, that the overflight be "in" the State, which it must be since it could not be anywhere else. Opp. 10. Indeed, the State says that the simplicity of this observation "should not obscure its importance or the devastation petitioners' inability to answer it wreaks on their claims." *Id.* But the question is not simply whether the overflight is "in" the State. The question, rather, is whether the State has a sufficient relationship with the overflight to justify the particular tax the State has assessed. Here, applying this Court's standards, the answer to that question is clearly no.[3]

2. We showed in our petition that the State's overflight tax not only directly violates decisions of this Court

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[2] These standards are the same ones applied by the Court under the "external consistency" test, heavily relied on by the State. Opp. 11. As the Court said in *Goldberg*, external consistency requires that a State tax "only that portion of the . . . interstate activity" that is related in "practical or economic effect" to "in-state business activity." 109 S.Ct. at 589. Oregon's overflight tax does not meet this test.

[3] Even if the question were simply whether the overflight occurs "in" the State, it is doubtful that the answer is yes. Certainly, the single case cited by the State (Opp. 10) does not support its position on that question. That case, *Nashville, Chattanooga & St. Louis Ry.* v. *Browning*, 310 U.S. 362 (1940), concerned a property tax levied on rolling railway equipment and based on an apportionment formula related to miles of track in the State. *Id.* at 365. Such a formula has no application here. As the Oregon Supreme Court itself recognized, "aircraft are, of course, different from rolling stock. Rolling stock and railroad track touch the ground, but aircraft in flight, obviously do not. Overflight aircraft did not touch the ground in Oregon *at all* . . . ." Pet. App. 9a (emphasis in original). And just as obviously, the State's special relationship with, and services afforded to railroads in constant contact with the ground are wholly unlike overflying aircraft that have no contact with the State *at all*.

prohibiting such a tax, but that it also risks multiple taxation of interstate aircraft and necessarily discriminates against those aircraft. Pet. 12-13. With regard to multiple taxation, Oregon first contends that no other State could include flight time over Oregon in an apportionment formula. Opp. 11-13. This contention is flatly contradicted by *Goldberg*.[4] The State next contends that we "must present proof of actual cumulative taxation" in order to complain of it. Again, the State is wrong; in fact, this Court has "categorically rejected" any such requirement. *Tyler Pipe Industries* v. *Washington Dep't of Revenue*, 483 U.S. 232, 242 (1987); *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 644-45 (1984). Finally, the State claims that it is inconsistent to complain of multiple taxation on the one hand, and complain on the other that *no State* may take account of overflight. Opp. 4, 17-18. But it is not our contention that no State may take account of overflight in a properly drawn apportionment formula. Rather, as we have shown, under *Goldberg*, *Mahin*, and *Northwest Airlines*, the originating or terminating State may consider it.[5]

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[4] As noted, in *Goldberg* this Court held that an originating or terminating State could apportion the whole of an interstate phone call's travel to itself, citing as support the cases indicating that the whole of interstate overflight is apportionable either to the terminus or domiciliary State. 109 S.Ct. at 589. The State is therefore wrong to say that no other State may apportion the overflight.

The State purports to distinguish *Goldberg* on the ground that it "involved a flat tax, not apportionment . . . ." Opp. 12. In fact, however, both this case and *Goldberg* required apportionment of the particular interstate activity to the State, after which a flat tax was applied to the apportioned amount.

[5] The State's assertions that we seek "to be free from *any* taxation" that takes overflight into account and that we claim "a constitutional guarantee of having . . . mobile property taxed at less than its full value" are completely unfair and inaccurate. Opp. 19 (emphasis in original). Indeed, while under the *Goldberg* rule *all* flight time may be easily apportioned—and therefore the aircraft

With regard to the discrimination against these petitioners, the State makes two points. First, it says that we did not raise discrimination below, and that the Court should therefore not consider it now. Opp. 14. But we *did* raise discrimination below, albeit as a State constitutional claim.[6] Where, as here, the substance of the State and federal discrimination claims are identical, where the State courts have interpreted State requirements as codifying federal constitutional requirements, and where petitioners did in fact raise the discrimination claim, the fact that they did not cite the particular constitutional provision now at issue does not preclude them from relying on it here. *See Braniff Airways*, 347 U.S. at 598-99. The State says, in any event, that so long as it uniformly applies its apportionment formula, there can be no discrimination. This completely ignores our contention that the *practical effect* of the overflight tax is both to charge interstate commerce a higher effective rate for State services than that charged intrastate commerce, and to arbitrarily charge some interstate carriers *no* tax (those with substantial overflight but no landings), while charging those with a single landing a tax both for that landing and all overflight. Such charges are discriminatory under this Court's decisions. *See* Pet. 13-14.

3. Finally, in addition to showing that Oregon's overflight tax contradicts numerous constitutional principles established by this Court, we also showed that such taxes are nevertheless proliferating, that the lower courts are divided over their permissibility, and that their widespread implementation would have a significant impact

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may be fully taxed—under Oregon's approach that would not be so. As the State concedes, its formula necessarily precludes full valuation by omitting flight over water and flight over States that happen not to have independent nexus with the overflying airline. Opp. 11 n.8.

[6] Appellants' Brief at 32.

on national transportation. Pet. 16-23. The State largely misunderstands the reasons we made these points; it was not to suggest that the points themselves raise issues warranting the Court's review. It was to show that the question presented by this case—the constitutionality of State taxes based on overflight—is an important one. Accordingly, when the State argues that the detrimental effects of overflight taxes is a matter for Congress to address, not this Court, it completely misses the point. Opp. 17. If overflight taxes such as the present one are unconstitutional, they are certainly a matter for this Court to address; and the fact that such taxes threaten to have a substantial adverse impact on the industry, consumers, and transportation in general is an additional reason for this Court to adjudicate that constitutional issue.

Similarly, the State misjudges the significance of the current division among the lower courts when it contends that that division involves nexus cases, not apportionment cases, and concerns facts not identical to the present case. Opp. 1, 17. What matters is that the lower courts are in conflict over the permissibility of overflight taxes, and that those taxes have now been approved in several forms—property taxes, income taxes, and sales taxes on goods purchased during overflight. See Pet. 16-18. Accordingly, because the overflight tax in this case contradicts decisions of this Court, because the lower courts are divided over the permissibility of such taxes, and because the further adoption of such taxes will have a major national impact, it is appropriate that this Court now determine their constitutionality.



## CONCLUSION

For the foregoing reasons, and those stated in our petition, certiorari should be granted.

Respectfully submitted,

ROBERT L. WEISS
RICHARD M. BOTTERI
JAMES P. DRAUDT
WEISS, DESCAMP & BOTTERI
2300 U.S. Bancorp Tower
Portland, Oregon 97204
(503) 243-2300

WALTER A. SMITH, JR.*
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5728
*Counsel for Petitioners*

* Counsel of Record